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CONDITIONS AND WARRANTIES IN THE SALE OF GOODS.

A DISTINGUISHED editor of Benjamin on Sales, at the beginning of a learned note to the chapter on Conditions, remarks: "This is not the most satisfactory chapter in Mr. Benjamin's excellent work, partly from the fact that he had already discussed one class of conditional sales in Book II, Chapter 3; partly because many incidents of a sale, which are called 'conditions' in England, are in this country generally considered as implied warranties, and their more appropriate place for the American reader is in the following chapter on Warranty; and, not a little, because, to use his own words, of the 'very subtle and perplexing nature' of the subject itself, leading one to discuss here what might with propriety be considered elsewhere." At the close of this note, the distinguished editor informs his readers that the latter part of the chapter on conditions dealing with sales by "description, etc., will be considered under the next head of Implied Warranty, where the American courts generally place it."[1]

On the other hand, the latest English editors of Benjamin on Sales commend the author for his clear exposition of the distinction between Condition and Warranty in the chapter above referred to, while they criticise him for devoting the greater part of the chapter on Warranty to

[1] Benjamin on Sales, Bennett's, 7th Ed., 594, 608.

those engagements of the seller, which he styles Implied Warranties, but which "are essentially conditions."[1]

It is not strange that Mr. Benjamin failed to adhere consistently to his distinction between conditions and warranties; nor is it surprising that different critics should ascribe his failure to different causes. In the first place, it should be borne in mind that his separation of implied conditions from implied warranties was something of a novelty. With the exception of Mr. Blackburn, every writer on the law of sales had dealt with both of these classes of engagements on the part of the seller, under the head of Warranty[2]; and Mr. Blackburn, while treating many of them as conditions, did not discuss the topic of warranty at all. In the next place, it should be remembered, that not only was the language of judges upon this subject most confusing, but the judicial decisions were very discordant. Even as great a lawyer as Chief Justice Gibson had declared[3]: "On no subject have the decisions been so anomalous as on the warranty of chattels, and an attempt to arrive at a satisfactory conclusion about any principle supposed to be established by them would be hopeless, if not absurd." Mr. Benjamin attempted indeed to classify, distinguish and harmonize the decisions, but he did not undertake to state the law as it ought to be; he professed only to state it as he found it declared by the courts.

That the confusion and inconsistencies in his chapters on Condition and Warranty are chargeable rather to the deliverances of the courts than to him receives further confirmation from the original draft of the English Sale of Goods Act. This bill, drawn by Judge Chalmers (the draftsman of the Bills of Exchange Act), after consultation with Lord Herschell, Lord Bramwell and other distinguished lawyers, was an attempt "to reproduce as exactly as possible the statutory and common law rules relating to the sale of goods,"[4] A comparison of the sections of the bill under the heading of "Conditions and Warranties," Sections 11 to 18, inclusive, with Sections 10 to 15, inclusive,

[1] Benjamin on Sales, Bennett's 7th Ed., 644, note (s).

[2] See Long on Sales, and Story on Sales.

[3] McFarland *v.* Newman, 9 Watts, 55 (1839).

[4] Chalmers' Sale of Goods, 1st Ed., Introduction.

of the Act, will show how badly confused by the cases were the learned draftsman and his counsellors. After wrestling with the subject for five years, Parliament was able to bring a considerable degree of order out of confusion and to declare with authority what engagements on the part of the seller are conditions and what engagements are warranties.

Distinction Between Warranty and Condition.

The Sale of Goods Act defines warranty as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."[1]

Condition is not specifically defined in the statute, but it is frequently contrasted with warranty as denoting every stipulation in a contract of sale, the breach of which may give rise to a right to treat the contract as repudiated. The statute also declares that "a stipulation may be a condition though called a warranty in a contract,"[2] and it applies the term "implied condition" to most of those engagements of the seller which judges and writers had been accustomed to call "implied warranties."

By confining the term warranty to the narrow but legitimate signification above set forth, the Sale of Goods Act has removed one of the most fruitful sources of confusion in this branch of the law. Prior to this enactment, a learned English writer,[3] after warning his readers "that the word warranty is used in a great variety of senses," declared that "it would be a work of some research to enumerate the various senses in which the word warranty is used," and then proceeded to recount six distinct significations which were commonly attached to it. "'Tis a consummation devoutly to be wished" that the word should be lim-

[1] The Sale of Goods Act, 1893, Section 62. This provision applies only to England and Ireland. The statute declares that "As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract."

[2] *Ibid*, Section 11.

[3] Anson on Contracts (3d Ed.), 297.

ited in this country, as it has been limited in England, to a single signification; but it is a consummation probably attainable only by legislation. And yet it would seem to be the duty of every writer or judge dealing with this subject, to use the word in its narrow and legitimate sense and in that sense only.

The Fallacy of Equivocation.

An excellent example of the confusion resulting from the variant significations of warranty is afforded by two cases in Massachusetts. In the earlier case,[1] the defendant asked the plaintiff if he wished to purchase some cloves, exhibiting at the same time a sample which plaintiff examined. Finding the sample to be of the best quality of Cayenne cloves, he gave an order to defendant for two casks, and, upon their delivery, paid the agreed price. Plaintiff did not open the casks nor inspect their contents at the time of delivery, but when he did open them some months later, discovering that the cloves did not correspond with the sample, but consisted of a mixture of Cayenne cloves and an inferior and distinct species, he offered to return them to defendant, who refused to take them back, whereupon the plaintiff sued to recover the difference in value between two casks of Cayenne cloves of the best quality and the cloves actually delivered. Upon the trial, the jury found that there was no fraud on the part of defendant, but that the cloves delivered were different in kind from those which composed the sample, and inferior in value; not because of decay or exposure, but because of the specific difference in the respective stocks from which the two kinds are produced; and returned a verdict for the plaintiff. The defendant's motion for a new trial having been argued with great ability by his counsel, afterwards Chief Justice Shaw, the case was carefully considered by the Supreme Judicial Court.

Chief Justice Parker, delivering the opinion, in which his associates concurred, stated the principal question to be: "Whether the evidence in the cause proved a contract to sell cloves of a different kind from those which were delivered." After referring to the contention of defendant's

[1] Bradford *v.* Manly, 13 Mass., 139 (1816).

counsel, "that no action upon a warranty can be maintained, unless the warranty is express; and that no other action can be maintained, unless there be a false affirmation respecting the quality of the article," and declaring that "if such were the law, it would very much embarrass the operations of trade, which are frequently carried on to a large amount by samples of the articles bought and sold"; the learned Judge proceeded to consider at length the nature of a sale by sample. His conclusion was, that the exhibition of a a sample by a seller "certainly means as much as this, 'The thing I offer to sell is of the same kind, and essentially of the same quality as the specimen I give you'"; and, in case the offer is accepted, the seller undertakes to supply an article which "is generically and specifically the same as the sample, and if a different thing is delivered, he does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him."

In other words, when a man contracts to sell goods by sample, he engages to deliver goods which are generically and specifically like the sample. This engagement is not collateral to the sale contract, but is one of its essential terms. If the seller fails to perform it, he fails to perform the contract, and the buyer has the right to reject the tendered goods and treat the contract as repudiated. In the nomenclature of the Sale of Goods Act, such an engagement is a condition, not a warranty.

Had Chief Justice Parker, in the case under consideration, described the seller's engagement as a condition, and then proceeded to discuss the rights of the buyer upon the seller's refusal to take back the cloves, his opinion would have been beyond criticism. After the seller declined the buyer's offer to return the cloves, and the buyer continued to retain them, the latter was at liberty to treat the breach of condition as a breach of warranty, and bring the action he did bring for damages. In the language of the Sale of Goods Act, "When a contract of sale is subject to any condition to be fulfilled by the seller, the buyer * * * may elect to treat the breach of such condition as a breach of warranty," and "may maintain an action against the seller for damages for the breach of warranty."[1] Unfortunately,

[1] Sale of Goods Act, Sections 11 and 53.

however, the learned Judge, instead of supporting the plaintiff's action on this ground, and of pointing out that the defendant's engagement, that the cloves to be delivered should conform to the sample, was no longer available to the plaintiff as a condition, because he had accepted those which were delivered, thought it necessary to demonstrate that the defendant's exhibition of the sample, although "a silent symbolical warranty," was, nevertheless, "tantamount to an express warranty." It is true he repudiated the proposition laid down by defendant's counsel that "a mere representation, without technical words importing a promise or stipulation, does not constitute a warranty;"[1] but he appears to have thought that the plaintiff could not recover without showing an engagement on the part of the defendant, which, from the outset, was either an express or an implied warranty.

This failure to give to the seller's engagement, upon a sale by sample, its proper appellation, did not work injury to the buyer in the case we have been considering, for the reason pointed out in the preceding paragraph; but the improper designation of that engagement as a warranty appears to have confused as eminent a lawyer as Justice Metcalf, and thus to have contributed, to some extent at least, to the anomalous decision in Bryant *v.* Isburgh,[2] the later of the two Massachusetts cases above referred to.

In this case, the plaintiff having sued for the price of a horse sold and delivered, the defendant answered that the plaintiff upon the sale expressly warranted the horse sound; that he proved unsound and defendant returned him to plaintiff, but plaintiff refused to receive the horse back. The trial judge charged the jury that the defendant had no right to return the horse and rescind the contract in the absence of fraud, unless that right were given by the terms of the contract; but that if they found there was a warranty and a breach, they should then determine how much less the horse was worth by reason of the unsoundness, and deduct the sum so determined from the contract price, and return a verdict only for the balance. A verdict was returned for the plaintiff, with a deduction from the contract

[1] Bradford *v.* Manly, 13 Mass., at p. 141.
[2] 13 Gray (79 Mass.) 607 (1859).

price. Exception having been alleged by the defendant, the Supreme Court decided that the ruling was erroneous, and declared "there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter which he has under the former." The statement in Bradford *v.* Manly, that upon a sale by sample the seller does not perform his contract if he tenders goods which do not correspond with the sample, and consequently he is bound to take them back if they are offered him, is referred to as a dictum, at least, in favor of the view that the buyer in the case then at bar could return the horse and rescind the bargain; for, said Mr. Justice Metcalf, "in Bradford *v.* Manly it was decided that a sale by sample was tantamount to an express warranty that the sample was a true representative of the thing sold." In Bryant *v.* Isburgh the transaction was the bargain and sale of a specific chattel. The main purpose of the sale contract was the transfer of the general ownership of the horse from the seller to the buyer; and collateral to that was the seller's agreement that the horse was sound. In Bradford *v.* Manly the goods were not specific when the contract was made, and it was a fundamental term of that contract that the seller should supply two casks of cloves like the sample. His non-performance of this term was a breach of the contract. He was defeating the main purpose of the contract, not violating an agreement which was simply collateral to that main purpose.

Although at times "words are but wind," not infrequently they are things, and a man

> "Is controlled by the words he disdains to control."

By using a word with a double meaning and failing to notice its duplicity, Mr. Justice Metcalf appears to have fallen a victim to the fallacy of equivocation.

Variant Significations of Warranty in New York.

If the indiscriminative use of warranty has contributed to the establishment of the unsound doctrine in Massachusetts that the breach of a collateral warranty upon the bargain and sale of specific goods gives the buyer the right to return them and treat the sale contract as repudiated, in

New York it is largely responsible for an equally unsound doctrine, that, upon the sale of goods by description, the buyer has not the right to retain them and claim damages if, upon their delivery, he discovers, or by ordinary inspection could discover, that they do not conform to the description.

How great is the confusion of the judicial mind in New York on the subject of warranty can be fully appreciated only after a careful comparison of the reported cases. Certainly no one can make that comparison without being impressed with the truth of Lord Coke's declaration that "the learning of warranties is one of the most curious and cunning learnings of the law." Space will not permit an extended examination of the New York decisions in the present article, but some idea of the divergent judicial views may be given by a brief digest of a few leading cases.

In Reed *v.* Randall[1], "The plaintiffs agreed to pay 10 cents per pound on the delivery of a crop of tobacco growing on defendant's land, well cured and boxed and in good condition, and the defendant agreed to sell and make such delivery." This engagement as to the boxing, curing and merchantable condition of the tobacco was declared not to be a warranty; and "the rules of law by which the rights of the parties in respect to warranties are regulated" were held to be inapplicable. In Dounce *v.* Dow[2] the plaintiff contracted to sell and deliver to defendants 10 tons of XX pipe iron, which should be of a quality suitable and proper for use in the defendant's manufacturing business. Here, the Commission of Appeals ruled, "was an express agreement or warranty that the iron should be of that specified or designated quality," and Reed *v.* Randall was distinguished as a case decided on the theory that it involved "an executory contract, but not an express warranty." On the second trial of Dounce *v.* Dow no evidence was given of an express engagement as to quality,[3] and it was held, both by the Supreme Court and by the Court of Appeals that there was a warranty that the iron was "XX pipe

[1] 29 N. Y., 358 (1864). The statement of the contract is taken from the prevailing opinion at pp. 360, 361.

[2] 57 N. Y., 16 (1874).

[3] 6 T. & C., 653, 656, 658 (1875).

iron." In the Court of Appeals it was said, "The only other liability which can be claimed he (the seller) incurred was of an implied warranty that the iron was merchantable, and this could not be affirmed unless the contract was executory."[1]

Another pair of New York cases, which it is interesting to contrast, are Hawkins *v.* Pemberton[2] and Coplay Iron Co. *v.* Pope[3]. In the former, the plaintiff sold to the defendant at auction an article, described by the auctioner, as "blue vitriol, sound and in good order." The Court had no hesitation in holding "that there was a warranty that the article was sound and in good order," and that "a jury might properly have inferred that there was, upon the sale, a warranty that the article sold was blue vitriol." It was the opinion of the learned Judge writing the opinion that the trial Court "could, without error, have decided, as a question of law, that there was a warranty," to this effect. In the second case, the engagement of the plaintiff, to sell to defendant "900 tons of No. 1 extra foundry pig-iron of the Coplay Iron Company make," was held not a warranty, although the plaintiff admitted that the "No. 1 extra was a grade of pig iron of certain well-known quality in the market." With the declarations in these two cases should be collated the statement of Judge Learned,[4] quoted with approval by the present Chief Judge of the Court of Appeals[5]: "There can be no difference between an executory contract to sell and deliver goods of such and such a quality, and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter."

Another set of cases, affording an interesting comparison, consists of Day *v.* Pool[6] and Gurney *v.* Atlantic, etc., Co.,[7] on the one hand, and Gaylord Manufacturing Co. *v.*

[1] 64 N. Y., 411 (1876).

[2] 51 N. Y., 198 (1872).

[3] 108 N. Y., 232; 15 N. E., 335 (1888).

[4] Kent *v.* Friedman, 17 Weekly Dig., 484; affd., 101 N. Y., 616 (1885).

[5] Fairbank Canning Co. *v.* Metzger, 118 N. Y., 260; 23 N. E., 372 (1890).

[6] 52 N. Y., 416 (1872).

[7] 58 N. Y., 358 (1874).

Allen[1] on the other. In Day *v.* Pool, the engagement of the seller to supply defendant with 80 barrels of rock-candy syrup "that would not crystallize, or the sugar fall down in its use," was construed as a warranty that the syrup should possess such characteristics; and in the Gurney case a similar construction was put upon a contract to manufacture and deliver a quantity of steel frogs, to correspond in all respects with a sample furnished the seller. On the other hand, in Gaylord Manufacturing Co. *v.* Allen, it was held that a contract to sell malleable iron castings "to be of the best quality and suitable to the purpose designed" did not contain a warranty. The difficulty experienced in reconciling these cases is increased rather than diminished by the following deliberate statement in the carefully considered opinion in White *v.* Miller:[2] "The case of Hawkins *v.* Pemberton, 51 N. Y., 198, adopts, as the law of this State, the doctrine upon this subject now prevailing elsewhere, that a sale of a chattel by a particular description is a warranty that the article sold is of the kind specified. We think the modern doctrine upon the subject reasonable, and proceeds upon a just interpretation of the contract of sale. A dealer who sells an article, describing it by the name of an article of commerce, the identity of which is not known to the purchaser, must understand that the latter relies upon the description as a representation by the seller that it is the thing described; and this constitutes a warranty."

The following statements, it is believed, are justified by the foregoing cases and others of a similiar character in New York. As a rule the term warranty is not confined to its narrow and legitimate sense, although it is thus limited in some of the decisions.[3] On the other hand, it is not so extended as to include all of those engagements of the seller, which are styled "implied conditions" in the English statute, but which are denominated "implied warranties" in many jurisdictions. Whether it shall be applied to an engagement of that sort (for example, the vendor's engage-

[1] 53 N. Y., 515 (1873).

[2] 71 N. Y., 118, 129 (1877).

[3] Gaylord Manufacturing Co. *v.* Allen, 53 N. Y. 515 (1873); Coplay Iron Co. *v.* Pope, 108 N. Y., 232 (1888) are examples.

ment in a sale by description), is made to depend, not upon the vital or the collateral character of the engagement, but upon the question, can the purchaser discover by an ordinary inspection, when the article is delivered, that it does not conform to the contract.[1] Or to put it in another way —the term warranty is applied to every engagement of the seller as to the character or quality of the subject-matter of the sale contract, which is not a mere condition. It embraces, therefore, not only the collateral agreement of warranty which may attend a bargain and sale, but every promise of a vendor, in a contract to sell, whether express or implied, which the purchaser is justified in believing the vendor intended should survive the acceptance of the delivered article.

Accordingly, a breach of warranty in New York may give rise to a claim to reject the goods and treat the contract as repudiated, or it may give rise only to a claim for damages. Whether it gives rise to the one or to the other claim depends upon whether the sale transaction is executory or is executed. In the language of a carefully considered case: "If the sale is of existing and specific goods, with or without warranty of quality, the title at once passes to the purchaser, and when there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot for that reason either refuse to accept the goods or return them. If the contract is executory, and the goods yet to be manufactured, no title can pass until delivery or some equivalent act to which both parties assent, and, when offered, the vendor may reject the goods as not answering the bargain, but if the sale was with warranty he may receive the goods and then the same consequences attach as in the former case, and among others, the right to compensation if the warranty is broken."[2]

Caveat Emptor and Warranty in New York.

That this peculiar usage of the term warranty has caused unnecessary confusion and perplexity in the law of sales in New York cannot be successfully denied. How is the pecu-

[1] Van Wyck *v.* Allen, 69 N. Y., 61 (1877).

[2] Brigg *v.* Hilton, 99 N. Y., 517, 529 (1885).

liarity to be accounted for? Apparently it is due in large measure to the spasmodic efforts of certain eminent Judges to stem the tide of encroachments upon the doctrine of *caveat emptor*, and to maintain the rule of primitive law that "the purchaser buys at his peril," unless he can show "an express warranty or some fraud on the part of the vendor." Let us trace rapidly the course of judicial decision on this topic.

Seixas *v.* Woods[1] is the first case in order of time. Defendant sold to plaintiff wood which had been sent to the former as brazilletto, and which he had advertised by that name, and which both parties supposed to be brazilletto, but which was, in truth, peachum, a wood of a different species and almost valueless. Upon discovering the real character of the article, plaintiff offered it to the defendant and demanded the purchase-money. Defendant refused to receive the property or to repay the price, and plaintiff brought "an action on the case for selling peachum wood for brazilletto." Judgment was given for the defendant on the ground that the description of the article did not amount to a warranty that it was brazilletto, and that "the maxim of *caveat emptor* must be applied."

Later came Swett *v.* Colgate,[2] where an article was described in the contract as barilla, but which was in fact kelp, "a substance so closely resembling barilla that it could not be distinguished from it except by analysis," yet greatly inferior to it in value. Seixas *v.* Wood was followed and judgment given for the seller, because "By the common law, where there is no fraud or agreement to the contrary, if the article turns out not to be that which it was supposed, the purchaser sustains the loss: the rule is *caveat emptor*."

The plaintiff, in Oneida Manufacturing Co. *v.* Lawrence,[3] having bought by sample a quantity of cotton in bales, and the bulk having turned out to be far inferior to the sample, brought an action for breach of warranty. Defendant relied largely upon Seixas *v.* Woods and Swett *v.* Colgate, but the Court thought the case was not controlled by those

[1] 2 Caines, 48, 52, 53, 54 (1804).
[2] 20 Johns., 196, 202 (1822).
[3] 4 Cowen, 440 (1825).

decisions, and sustained a verdict for plaintiff on the ground that "in cases of sales by sample, the vendor is held responsible that the quality of the bulk of the commodity shall be equal to the sample shown." The disposition evinced by Chief Justice Savage, in the last cited case, to trench upon the doctrine of *caveat emptor*, was shared by Mr. Justice Nelson in Gallagher *v.* Waring,[1] also an action growing out of a sale of cotton by sample. He said: "A sale by sample implies a warranty that the bulk corresponds with the sample. Every sale implies a warranty of the title to the article; and when the vendee has no opportunity of examining the article, the sale implies that the article delivered is of the kind and species of that which was contracted for, and is of good merchantable quality and condition; as then the maxim *caveat emptor* cannot apply. These principles are fully supported by authority, and inculcate in commercial dealings sound maxims of morality, from which no honest man can claim an exemption."

On appeal, Mr. Justice Nelson's views were not fully approved by the Court of Errors.[2] The judgment was affirmed by a divided court, but Chancellor Walworth, who wrote the prevailing opinion, was careful to place the decision on the ground that "every agreement to sell by sample does, from its very nature, contain an implied, if not an express, warranty, that the bulk of the article sold corresponds with such sample"; and to reject the doctrine of an implied warranty of merchantableness. Senator Paige, speaking for the minority, argued at length for the repudiation of all implied warranties. The tendency to a strict enforcement of the rule of *caveat emptor* displayed on this appeal, was shown in another case decided at the same Term. In Wright *v.* Hart,[3] the trial Judge instructed the jury that if the flour sold by defendant to plaintiff was defective and unfit for the ordinary purposes for which flour is used, the plaintiff was entitled to recover. This ruling was held erroneous, both by the Supreme Court and the Court of Errors, and the doctrine was announced that "in

[1] 9 Wend., 20, 27 (1832).
[2] Waring *v.* Mason, 18 Wend., 425 (1837).
[3] 18 Wend., 449 (1837).

a general sale of merchandise for a sound price, where there is no express warranty or fraud, an action will not lie against the vendor on an implied warranty that the article is merchantable." The opinion of Mr. Justice Cowen[1] and of Senator Tracy[2] are spirited if not vehement defenses of the maxim of *caveat emptor*. They were thought by Chancellor Kent to have reinstated the common law doctrine upon this point in the jurisprudence of New York.[3]

For a time it looked as though they had accomplished that result. In Hargous *v.* Stone,[4] Judge Paige (the Senator Paige, of Waring *v.* Mason, *supra*), delivering the unanimous opinion of the Court of Appeals, declared that the only inroad which the courts of New York had made upon the common law rule of *caveat emptor*, was in sales by samples; and "this exception," he said, "rested upon no principle," and had been applied only to "sales of cotton packed in bales." He championed the common law rule with great earnestness and enthusiasm, characterizing it as a "most just and convenient rule," and, insisting that "if the purchaser does not wish to run the risk of latent defects, he must provide himself an indemnity against such defects, by exacting an express warranty from the vendor when such warranty is required," he added, "the vendor will be at liberty to decide for himself whether he will enter into a contract of warranty or not."

However, a reaction from this rigid adherence to the rule of *caveat emptor* soon set in, as is attested by the opinion of Judge Selden in Hoe *v.* Sanborn.[5] Here the buyer as a defense to an action for the price of certain saws, alleged plaintiffs' breach of warranty that the saws were "good saws and of good quality." No express warranty was shown, but the Court of Appeals decided "that a manufacturer who sells goods of his own manufacture impliedly warrants that they are free from any latent defect growing out of the process of manufacture." Judge Selden

[1] Hart *v.* Wright, 17 Wend., 267 (1837).

[2] Wright *v.* Hart, 18 Wend., 458–465 (1837).

[3] 2 Kent's Comm., 479, note (c).

[4] 5 N. Y., 73, 84, 89, 90 (1851).

[5] 21 N. Y., 552 (1860).

referred to the disposition of many New York judges to reject all exceptions to the maxim *caveat emptor*, but declared that "if honesty and fair dealing are ever to be enforced by law, a warranty should be implied," in such a case as was then before the Court. He also expressed the opinion that "implied warranties do not rest upon any supposed agreement in fact. They are obligations which the law raises upon principles foreign to the actual contract; principles which are strictly analogous to those upon which vendors are held liable for fraud."[1]

A few years later the Court of Appeals unhesitatingly declared that in an executory agreement to sell and deliver corn there was an implied warranty that the corn should be of a merchantable quality.[2] During the progress of this reaction the cases of Seixas *v.* Woods and Swett *v.* Colgate, after having been criticised in other jurisdictions and but lamely defended by Chancellor Kent[3] were thoroughly discredited in Hawkins *v.* Pemberton[4]; and, in White *v.* Miller [5], were treated as virtually overruled.[6]

Breach of Condition Not Convertible into Breach of Warranty.

Meanwhile, however, the partisans of *caveat emptor* had rallied and committed the Court of Appeals to a position, which has blocked the development of this branch of the law along the natural lines which have characterized its progress in England, and in many of our jurisdictions.

[1] In Randall *v.* Newson, 2 Q. B. D., 102 (1877), Brett, J. A., announced a different and better view, viz.: "The governing principle" (in implied warranties, now called conditions by the English Sale of Goods Act) "is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out."

[2] Hamilton *v.* Gaynard, 2 Abb. App., Dec., 314 (1866).

[3] 2 Kent's Comm., 479.

[4] 51 N. Y., 198 (1872).

[5] 71 N. Y., 118 (1877).

[6] After these declarations of the Court of Appeals it is not a little surprising to find Seixas *v.* Woods cited for the proposition, "that when there is neither express warranty nor fraudulent representation as to quality or goodness of an article sold, the vendor is not bound to answer except under special circumstances, and that the rule of *caveat emptor* applies;" as was done in Ives *v.* Ellis, 50 App. Div., 399 (1900).

In Reed *v.* Randall,[1] referred to on a former page, the Court decided that one who agreed to buy a crop of tobacco, thereafter to be well cured, boxed and delivered in good condition, had a right to reject the tobacco when tendered if it did not conform to the contract; but if he received and retained it after an opportunity to ascertain its defects, he thereby waived all remedy for the vendor's breach of his contract. Prior decisions compelled the Court to admit that upon an agreement to sell goods, there is an implied warranty that they are merchantable; but its dislike of implied warranties and its desire to limit their effects as narrowly as possible, led it to the conclusion that the vendor's engagement as to merchantableness is not a true warranty and is never available as such to the vendee; that it does not amount to a covenant for indemnity; but that it is a term of the sale contract, and a term which is available to the vendee only as a condition. In support of this view, the principal American authority cited is Hargous *v.* Stone,[2] while the English authorities are four *nisi prius* cases,[3] some of which have been overruled, and none of which are now treated in England as warranting the proposition above set forth. Judge Hogeboom wrote a vigorous dissenting opinion, and other judges[4] have doubted the wisdom of the decision; but, with a modification to be mentioned presently, it remains law in New York.[5]

The doctrine of Reed *v.* Randall never obtained in England. It was contended for by the defendant in Yeats *v.* Pim[6] but was repudiated by the Court, consisting of Lord Chief Justice Gibbs and Justices Dallas and Park. The plaintiffs in that case contracted for "fifty bales Purvise's prime singed bacon"; and that quantity was delivered and retained by them. After nearly two months

[1] 29 N. Y., 358 (1864).

[2] 5 N. Y., 73 (1851).

[3] Grimaldi *v.* White, 4 Esp., 95 (1802); Fisher *v*, Samuder, 1 Camp., 190 (1808); Hopkins *v.* Appleby, 1 Stark, 477 (1816); Milnor *v*, Tucker, 1 Car. & P., 15 (1823).

[4] Woodruff *v.* Peterson, 51 Barb., 255, 256 (1868); Harris *v.* Rathbun, 2 Keyes, 312, 315 (1866).

[5] Coplay Iron Co. *v.* Pope, 108 N. Y., 232 (1888); Mack *v.* Swett, 140 N. Y., 193 (1893).

[6] 2 Marshall, 141 (1816).

they gave notice to the sellers that the bacon did not answer the contract, and, having paid the price, sued for damages for breach of warranty. It was held that the retention of the goods and the failure to give prompt notice of the defect did not prevent a recovery. The delay in notifying the sellers was of importance only as evidence bearing on the question, whether the defect existed when the goods were delivered.

A similar ruling was made in Freeman *v.* Baker,[1] where a ship, advertised by defendant as copper fastened, was bought, paid for and received by plaintiff. He did not examine the ship before making the contract, but did on the following day and then discovered that she was not copper fastened, yet he did not reject the vessel; nor did he make any complaint for several months, and later sued for damages. At the trial, defendant's counsel contended that "plaintiff should have notified his objection sooner" and "the foreman of the jury inquired whether it would make any difference as to the verdict if the jury should think that the ship was not copper fastened, but that the plaintiff ought to have made his objection sooner." Chief Justice Denman answered: "I do not think that it will make any difference; it would have been much better if notice had been immediately given. But I think the plaintiff was not bound to give it. I think a man may complete the contract, and then recover from the seller any difference in the value, if he has been deceived. I think so for this reason, viz., that a man may want a vessel for his immediate purposes, and it may be inconvenient to him to give it up at the time."

This view of the Chief Justice has been uniformly approved by the English courts and is now embodied in the Sale of Goods Act.[2] It is accepted in many American jurisdictions.[3]

[1] 5 C. & P., 475, 483 (1833). At the trial and on the discussion of a rule *nisi*, the Chief Justice was of the opinion that, as the contract of sale was reduced to writing, and this statement as to copper fastening was not incorporated therein, it was not a term of the sale contract. Consequently the plaintiff was nonsuited.

[2] Sections 11 and 53.

[3] Underwood *v.* Wolf, 131 Ill., 425 (1890); Northwestern Cordage Co. *v.* Rice, 5 N. D., 432; 67 N. W., 298 (1896); Morse *v.* Moore, 83 Me., 471; 22 At., 362 (1891).

The modification of Reed *v.* Randall, referred to above, was made by a divided court in Day *v.* Pool,[1] and recognized by Chief Judge Church in Gurney *v.* Atlantic, etc., Co.,[2] to this effect. When the seller is bound to deliver goods of a particular quality, although the obligation does not take the form of a collateral warranty, but results from the terms of the sale contract (as in the case of a sale by description), yet, if the defect in the goods is of such a character as not to be discoverable upon the usual and ordinary inspection at the time of delivery, the buyer is not bound, upon a subsequent discovery of the defect, to return the goods or notify the seller. His continued retention and use of them will not amount to a waiver and acceptance; but he may recover damages, "relying upon the so-called warranty." It is difficult to answer Chief Justice Church's question, why should the time or mode of examination make any difference in the duty of the buyer to return the goods? If he is bound to return them in a case where he discovers the defect at the time of delivery, why should he not be bound to return them promptly upon discovering their defect at a later day?

However, while the modification of Reed *v.* Randall may be illogical, it does afford the buyer some relief from the harsh consequences of that decision. How unfairly even the modified doctrine affects the purchaser is apparent from Coplay Iron Co. *v.* Pope.[3] The defendants, iron brokers in New York, accepted an order from E. P. Allis & Co. of Milwaukee, Wis., for 500 tons of No. 1 extra foundry pig iron of the Coplay Iron Company's manufacture, to be delivered at the furnace of the iron company at Coplay, Pa. They, in turn, ordered the iron from the company, and directed it to be shipped to Allis & Co. Defendants did not examine it before shipment, but when it reached Milwaukee Allis & Co. rejected it on the ground that it was not No. 1 extra foundry pig-iron, but iron of a quality greatly inferior thereto. Defendants informed plaintiff at once of the claim made by Allis & Co., requested it to ex-

[1] 52 N. Y., 416 (1873).

[2] 58 N. Y., 358, 365 (1874); the Chief Judge dissented in Day *v.* Pool, on the grounds set forth in Gurney *v.* Atlantic, etc., Co., *supra*.

[3] Coplay Iron Co. *v.* Pope, 108 N. Y., 232 (1888).

amine the iron, and notified it that they would hold it liable for all damages they might sustain by reason of the iron not being of the kind ordered. Allis & Co. having paid the Popes for the iron before delivery, and having rejected it when tendered, sued them for the price and recovered on the ground that the iron furnished was not of the grade ordered.[1] The Popes were also sued by the Coplay Iron Company for the price of the iron. In this suit they alleged and proved the facts above set forth, and asked to counterclaim their damages against the plaintiff's cause of action. They were again beaten. "Here," said the Court of Appeals "there was no collateral warranty or agreement as to the quality of the iron. The representation as to the kind and quality of iron was part of the contract of sale itself, descriptive simply of the article to be delivered in the future; and * * * an acceptance of the property by the defendants, without any offer to return the same at any time, deprives them of any right to make complaint of its inferior quality."

Whether a Stipulation is a Condition or a Warranty.

While the English decisions and Sale of Goods Act protect the buyer from being victimized as in the Coplay Iron Company case; and while they simplify the legal rules, as well as promote justice between seller and buyer, they do not remove all difficulty from this branch of the law. A recent English case[2] is quite in point. Plaintiff sued for the purchase-price of a machine. The defense was that plaintiff offered to sell a "self-binder" to the defendant, which the latter had never seen, and which plaintiff described as practically new, having been used but one season, and having cut 50 to 60 acres only. Upon delivery defendant discovered it was not practically new, having been used more than one season, and having been mended. He notified plaintiff that it did not conform to the contract, and, after about six weeks, returned it. The trial Judge ruled that it was a sale by description, but as the buyer had kept

[1] Pope *v.* Allis, 115 U. S., 363 (1885).

[2] Varley *v.* Whipp (1900), 1 Q. B., 513; 69 L. J. Q. B., 333.

the machine an unreasonable time, he could only treat the statement concerning the character of the machine as a collateral warranty, and not as a condition entitling him to rescind. On appeal, however, it was held that the words describing the machine were a condition and not a collateral warranty, and that defendant's delay in sending back the machine did not convert the condition into a warranty. Mr. Justice Channell, after remarking that "the case turns upon a rather fine point, namely, whether certain words used by the seller were part of the description or merely constituted a collateral warranty," illustrated the difference between a condition and a warranty as follows: "If a person says, 'I will sell you my four-year-old in the last stall,' and there is no four-year-old, but a horse of a different age," the property in the horse would not pass, unless the purchaser waives the condition that the horse tendered shall correspond with the description and accepts him. "If he had said, 'I will sell you a four-year-old horse in my M stall, and he is sound,' the latter part of the statement would be a collateral warranty."

The difficulty at present in England is not in apprehending the legal distinction between a condition and a warranty, but in applying that distinction to the construction of particular contracts—a difficulty of meager proportions in comparison with that which besets the New York lawyer when called upon to advise his client whether a given stipulation in a sale contract is a warranty, or may become available as a warranty.

CAVEAT EMPTOR *vs.* CAVEAT VENDITOR.

In Seixas *v.* Woods,[1] Mr. Justice Kent, after contrasting the maxim of *caveat emptor* with that of *caveat venditor*, declared: "If the question was *res integra* in our law, I confess I should be overcome by the reasoning of the civilians. And yet," he added, "the rule of the common law has been well and elegantly vindicated by Fonblanque, as most happily reconciling the claims of convenience with the duties of good faith." His latest opinion upon the subject, however, appears to have been unreservedly in favor

[1] 2 Caines, 48, 55, (1804).

of the wisdom and soundness of Fonblanque's view, and in opposition to that of the civilians, which had commended itself to him in early life. To quote his own words: "I cannot but think that the old rule, and the old decisions, down to that of Seixas *v.* Woods, were the safest and wisest guides; and that the new doctrine" of "implied warranty" of merchantableness and of fitness for use, "will lead to much difficulty and vexatious litigation in mercantile business."[1]

This theory that the rule of *caveat emptor* tends to restrain litigation has been championed with great earnestness, both in this country[2] and in England;[3] and yet, on both sides of the Atlantic, "the distinct tendency of modern cases" and of modern legislation "is to limit its scope."[4] That tendency will continue undoubtedly, for it is in accordance with the demands of a commercial age.

It is true that an eminent and learned judge has declared, "The rule of the civil law, viz., *caveat venditor*, was adopted at an early period, and, in reference, as it would seem, rather to those articles which are of general and ordinary use, than to such as enter extensively into the commerce of the country; while that of the common law, viz., *caveat emptor*, originating in a commercial age, and among a highly commercial people, naturally took the form best calculated to promote the freedom of trade."[5] But a statement could not well be more inaccurate.

The early rule of the civil law "in effect, was *caveat emptor*."[6] Unless the seller was guilty of fraud or the buyer had protected himself by express stipulation,[7] the latter had no remedy for defects in the goods sold. With the growth of commerce in the Roman world, not only the

[1] 2 Kent's Commentaries, 479, note (c).

[2] Hart *v.* Wright, 17 Wend., 267, 273 (1837); S. C. on Appeal, 18 Wend., 449, 463 (1837).

[3] Mercantile Law Commission, 1855, 2d Report, p. 10.

[4] Chalmers' Sale of Goods Act, 3d Ed., 32.

[5] Selden, *J.*, in Hoe *v.* Sanborn, 21 N. Y., 552, 558 (1862).

[6] Moyle's Contract of Sale in the Civil Law, 191.

[7] The following form of stipulation is given by Varro: "That these she goats are to-day in good health and able to drink, and that one may lawfully have them—all this you undertake?"—Translated in Hunter's Roman Law, 498.

inadequacy, but the injustice, of this rule of primitive law became apparent, and it was modified by the Curule Ædile. At first the Ædilician Edict appears to have been confined to the sale of slaves in open market, but later by edict and by the construction put upon edictal law by the jurists, the doctrine of *caveat venditor* was fully established, "so that an implied warranty of freedom from defects impairing reasonable use came to be inherent in every sale of any magnitude, wherever entered into."[1]

The same causes which converted the rule of *caveat emptor* into that of *caveat venditor* in Roman law have been operating, during the last century, towards the same result in English law. Judges and mercantile law commissions may inveigh against the tendency as stoutly and as eloquently as they please; their efforts will prove fruitless. As well may they fight against the stars in their courses. Already the exceptions to *caveat emptor* are so numerous that the rule as formulated in Coke on Littleton[2] no longer exists. In the great majority of cases, the vendor of goods, even in the absence of any express undertaking on the subject, is held to engage that he is the owner of the article which he proffers for sale; or that it is of merchantable quality; or that it is fit for a particular purpose; or that it answers the description under which it is sold; or that it conforms to a sample which the purchaser has examined. A common law maxim which antedates Coke on Littleton, cannot be said to have had its origin in a commercial age. In fact *caveat emptor* is a rule of primitive law. The modern tendency in English jurisprudence to narrow its scope is not due to any disposition on the part of the bench or bar to prefer civil law doctrines to those of the common law. It is only an illustration of the truth of Sir Henry Maine's remark[3] that "our own jurisprudence and that of Rome ought to be studied together, not because they were *once* alike, but because they *will be* alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we" English-speak-

[1] Moyle's Contract of Sale in the Civil Law, 194, 195.

Co. Litt., 12a.

[3] Maine's Village Communities and Miscellanies, 332.

ing lawyers "are slowly, and perhaps unconsciously or unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought and to the same conceptions of legal principle to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation."

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